Charles F. Goodhue v. Tovey

Appeal from the Court of

Chancery

In the Court of Error and Appeal

IN THE

COURT OF ERROR & APPEAL.

IN RE GOODHUE.

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TOVEY *v.* GOODHUE.

GOODHUE AND OTHERS *v.* TOVEY AND OTHERS.

Appeal from the Court of Chancery.

JUDGMENTS GIVEN,

ON TUESDAY, THE 16TH JANUARY, 1872.

REPORTED BY

ALEXANDER GRANT,

OF OSGOODE HALL,

BARRISTER-AT-LAW, REPORTER TO THE COURT.

TORONTO:
GLOBE PRINTING COMPANY, 26 & 28 KING STREET EAST.
1872.

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FOLLOWING JUDGMENTS WERE GIVEN.

GALT, J., expressed his entire concurrence in the Judgment to be delivered by the Chief Justice, as well as in the remarks made and reasons given for the conclusion. He explained that he thought the completion of the matter, after allotment and distribution by necessary conveyance, should be made by the Referee, in order fully to relieve the Trustees from all further trouble and responsibility.

GWYNNE, J.—What has been contended on the part of the Defendants in the above suit is, that the Legislature, in the exercise of what is termed its paramount authority, has arbitrarily, by the Act alluded to (34 Vic. chap. 99), transferred to the Testator's children the whole of the Testator's residuary estate, although he had not by his will devised it to them, and has deprived the Testator's grandchildren of their hopes of partaking in the Testator's bounty, by stripping them of all possibility of enjoying estates which, in a given event which may yet happen, the Testator had devised to them.

Conceding that the Legislature has the power to commit such a palpable injustice, I cannot be persuaded that the Act in question has done so unless I find such an intent plainly and unequivocally stated, in language so express as to admit of no possible misconception, and no shadow of a doubt.

It is always to be presumed that the Legislature, when it entertains an intention, will express it in clear and explicit terms: Gas Co. *v.* Clarke, 11 C.B., N.S. 827. When an Act of Parliament interferes with, or when the contention is that it interferes with, private rights and private interests, it ought to receive a most strict construction in so far as those rights and interests are concerned; and so clearly is this the established doctrine of the Court, that Lord Justice Sir G. Turner, in Hughes *v.* Chester and Holyhead Railway Company, 8 Jur. N.S. 221, said that "it is unnecessary to refer to any cases upon the point, and that they might be cited almost without end."

In Eton College *v.* Bishop of Winchester, Lofft. 401, it is said, "The construction of a Private Act is to be governed by the principles of common law, and applied to the subject in a manner analogously to the rules of interpretation of a private deed or conveyance."—The Court knows nothing of the intention of an Act, except from the words in which it is expressed.

In Edinburgh and Glasgow Railway Company *v.* the Magistrates of Linlithgow, 3 Macqueen, H. of L. 704, Lord Truro, C. J., says that a recital, even in an Act of Parliament, will not bind those who are not within its enacting part. And our own interpretation Act, Ontario Statute, 31 Vict., ch. 1, sec. 31, enacts that if an Act of the Legislature of Ontario be of the nature of a Private Act, *it shall not affect the rights of any persons, such only excepted as are therein mentioned and referred to.*

The whole frame of the Deed which the Act confirms is based upon the assumption that the estate of the Testator's children, living at *his* death, in the Testator's residuary real and personal estate, is a vested estate, and that the period of

distribution only is postponed until the decease of Testator's widow.

The Deed recites, among other things, as the occasion of the provisions of the Deed, as follows :—"And whereas all the said Testator's children have attained the full age of 21 years; and whereas (after paying and providing for all out-goings) the residuary estate is of large value, amounting to more than $300,000, *and the respective shares of the Testator's said children therein are* considerable, and it is desirable that they should respectively enter into the possession and enjoyment *of the same, and that this should not be postponed until the decease of the said widow of the deceased*; and whereas the several parties hereto have respectively assented and agreed to enter into and execute these presents, IN ORDER TO secure to each of the children of the Testator *the immediate possession* and enjoyment *of their respective shares in the said residuary estate.*" The Deed, for the reasons here recited, then proceeds to declare, among other things, as follows:

"Now these presents *therefore* witness, and it is hereby respectively covenanted and agreed upon by and between the said respective parties and their respective Heirs, Executors and Administrators, as follows :"—Fifth—" That the residue of the said Trust estate, other than is hereinbefore excepted, shall be divided into six separate shares or allotments, of equal value, or as nearly so as circumstances will permit, and such division into the said allotments shall be made as soon as conveniently may be by the said Trustees ; and in making such allotments, the Trustees shall distribute the said trust estate *in specie, as the same may then happen to be*, and without converting or collecting, or assuming to convert or collect *the same or any part of the said trust premises, and without making any equal partition of the said trust estate* which consists of realty, but treating and considering the whole of the said residuary estate to be allotted as converted into personalty, and of the money value ascribed by the said Trustees to each part and parcel thereof; and that in case the said Trustees shall neglect or refuse to make such allotment or distribution, or in case

they should differ about the same, or in case of the death or removal from this Province, or the resignation of either of them the said Trustees, in any of such cases any of the parties to these presents, other than the party of the first part, (that is the widow), may apply to the Court of Chancery or a Judge thereof, in a summary manner, *to appoint one or more Referee or Referees, by whom such allotment* may be *validly* made; and that in case of any difference as to which of the said several allotments *shall be taken by any of the said children, for his or her shares* respectively, the same shall be determined by lot or drawings by the said Trustees, or Referee or Referees, in the presence of at least three of the said children.

6th. "When the said several allotments shall have been determined and the respective shares distributed or assigned to each of the said children, *then* the said respective shares to which the children are before said to be beneficially entitled in common, shall be duly conveyed and transferred according to the several natures of the respective parts of such shares, unto and to the use of each of the said children, their respective heirs, executors, administrators and assigns absolutely IN SEVERALTY."

Now, throughout the whole of this Deed there is not a word to indicate that there was any doubt entertained as *to the vested* estate of the Testator's children, living at his death, in the residuary trust estate; true, the Will is recited, whereby it appears that the trusts of the Will are "for all the Testator's children who should be living at the decease of the Testator's wife, in equal shares, and the children of such of them as might then be dead, such grandchild or grandchildren to be entitled to the share his her or their father or mother would have been entitled to if living"; but the Deed treats this as an estate vested in interest in the Testator's children living at his death, with the period of possession only postponed until the widow's death, and regards the interest of the grandchildren as being no other than by way of transmission through their parents, the Testator's children. The object of the Deed, treating the estate of the Testator's children to be

vested under the will, *is simply to expedite the period of possession, and to obtain a transfer to each of his or her share* in specie; that, is whether real or personal estate, to be so conveyed as to pass according to the nature of the estate—if real, to each child's Heirs—if personal, to his or her Executors and Administrators. These are the only deviations from the Trust purposes declared by the Testator as to his residuary real and personal estate by his Will, which are professed and declared to be within the contemplation of the Deed, and that this was the whole scope and contemplation of the Deed appears clearly, as I think, from the eighth paragraph, viz.: "Inasmuch as it is doubtful whether the hereinbefore "agreed upon arrangements for the settlement and distribution by the said widow and children of the said estate of the said Testator can be legally assented to or carried into effect by the Trustees, BY REASON OF THE COVERTURE of several of the said parties hereto, and also *from the insufficiency of the powers of the said Trustees under the said Will*, it is hereby agreed that an application shall be made to the Legislature of the Province of Ontario *for an Act to confirm* these presents, and for such power as may be incidental thereto, *or necessary in the premises*."

The object of the Deed, then, was to expedite the period of possession of estates claimed to be and treated as vested in interest in the Testator's children, and to obtain an *immediate* transfer of such vested estates in both the real and personal estates as existing, instead of in personalty only, after conversion of the realty into personalty; and the declared object of the Act which was to be applied for was to *confirm that Deed*, and effect those purposes, notwithstanding the doubts as to its validity by reason of some of the parties being *femmes couvertes*, and by reason of the insufficiency of the powers given to the Trustees to enable them to transfer the estate to the parties to the Deed (although entitled to such vested interests) sooner than was directed by the Will.

The Petition to the Legislature, as set forth in the Act as the reason for the passing of the Act, stated, among other things, the execution of above Deed, which was set out in full,

and that the object of the Deed *was to secure* to each of the children of the Testator *the immediate* possession and *enjoyment of their respective shares* in the said residuary estate, without being postponed until the death of Testator's widow, and it *therefore* prayed that an Act might be passed in order to confirm the said Indenture and the several provisions thereof, and to effectuate the same. It was thereupon enacted—"That the said Indenture of the 26th Sept., 1870, in the Schedule of the Act set forth, is hereby confirmed and declared to be valid, *and the said Trustees* of the estate of the said Honourable George Jervis Goodhue, deceased, *are hereby authorized and required to carry into effect the several provisions thereof*, and in so doing are hereby saved harmless and indemnified in the premises."

Now, in so far as the operation of the Deed is concerned, all that the Act of the Legislature professes to do is, as it appears to me, to confirm it and make it valid, notwithstanding the doubts therein recited as to its being valid for the reasons therein stated, without an Act—To remove, in effect, simply the suggested doubts.

The Act then proposes to do no more than the Deed itself purports to do, and as the Deed itself suggests, it could have effectually done but for the doubts suggested. The removal of the doubts was all that was suggested to be necessary to give it complete validity. Now, under these circumstances, what is the effect of the enactment which declares the Deed to be valid? A Deed is said to be valid, I take it, when it is effectual to bind the parties thereto and their privies to the extent of the purposes, scope and intent of the Deed as declared therein. A Deed *inter partes* has no validity or binding force upon any persons not parties thereto. To be bound thereby, a person must be a party thereto or in privity with a party. Infants and married women, although parties to and executing a Deed, may not be bound by the Deed by reason of their legal infirmity as infants or married women; but no one, whether infant or married woman, can be in any manner affected by

a Deed touching and concerning matters in which they have an interest, unless they are parties thereto, or unless in virtue of some *express provision* of an Act of Parliament, as for instance, the Act enabling Tenants in tail to bar the estate tail and all remainders. The effect of the declaration in the Act is, as it appears to me, at most to declare and enact that the Deed shall be valid and binding according to its tenor and effect, true intent and meaning, *upon the several parties* thereto, notwithstanding the doubts expressed as to married women who had signed it not being bound, and upon the Trustees of the Testator's estate, notwithstanding that they were not, in their character of Trustees, parties assenting thereto, in so far as to authorize them to transfer to the parties to the Deed in severalty such shares as were vested in them in interest by the Will without waiting for the decease of Testator's widow; but the Act does not profess to deprive, and therefore cannot be construed to have an effect so contrary to all our ideas of legislation and of natural justice as to deprive, any persons, least of all infants, who are contingently made objects of the Testator's bounty, of the prospective benefit of such bounty, nor does it profess to vest, and therefore we cannot construe it to have an effect so contrary to all our ideas of legislation and of natural justice as to vest, in any persons, an estate and interest in the Testator's estate, which the Testator has not himself vested in such persons, but has made contingent upon an event yet in the future.

In the absence of an *express* legislative enactment, we cannot, I think, having regard to the recognized rules of construction of all instruments, hold that persons who, depending upon a contingency which has not yet happened, may be entitled to share in the Testator's residuary estate, are deprived of such interest by a simple declaration that a Deed, to which such persons are not parties, or in privity with any of the parties, and which treats the estate as one in which they never could have any interest, and as if all persons interested therein were parties executing the deed, *should be valid*. Then the Act authorizes and requires the Trustees of

the Testator's estate to carry into effect the several provisions of the Deed. Now, what are these provisions? This question involves the consideration of the construction of the Deed, an enquiry as to what is its true intent and purpose, nature and effect. To ascertain this purpose we must look at all the recitals, and at the whole scope and object of the Deed as expressed therein, and doing so, we find it to be declared to be to expedite the personal possession and enjoyment of estates *which the Deed treats as already vested in interest*, and to obtain a transfer of *such vested estates to each* of the parties entitled to the Testator's residuary real and personal estate, in realty and personalty as it exists, and not wholly in personalty after conversion of realty into personalty. The express object of the Deed is declared to be "*to secure to each of the children* of the Testator the immediate possession and enjoyment of *their respective shares* in the said residuary estate, instead of having the period of such possession and enjoyment postponed until the decease of the Testator's widow." Such being the declared object, scope, and intent of the Deed, the Trustees are authorized and required to carry such object into effect, and the Act is declared to be their warrant for *so* doing. Such, then, being the provisions of the Deed, according to the proper construction to be put upon it, it cannot be held that a clause in the Act authorizing and requiring the Trustees to carry such provisions into effect, notwithstanding that the Testator's Will had, as was suggested, directed them to defer the period of possession, should have the effect of requiring them to transfer the Testator's estate to persons to whom he had not devised it, and of saving them harmless as against the claims of the parties to whom he had devised it, if they should make such a disposition of the estate of which they were made Trustees.

Reading the Act by the light of the recitals contained therein as to the scope, object and purpose of the Deed, and as to the *necessity therein stated* for applying to the Legislature to confirm it, by reason of some of the parties being under coverture, and of doubts existing whether under those circum-

stances they were bound by the Deed, we must, I think, hold that what the Act professes to authorize the Trustees to do is not to deprive the Infant Plaintiffs of the bounty which, in a given event, the Testator devised to them, but to divide the residuary estate into six equal shares, and to transfer to the several parties to the Deed the several shares *which were vested in them in interest*, if they were vested in them in interest, as the Deed treated them to be, thus expediting only the period of enjoyment. Without the most unequivocal and express language, I cannot venture to assume that the Legislature contemplated such an injustice and such a departure from all the rules and principles governing courts of justice, as to deprive the Testator's Infant Grandchildren of the estates devised to them by the Testator's Will, in the event of their Parent, the Testator's child, not surviving his widow. The intention of the Act, to be collected from its recitals and enacting clauses, is, as it appears to me, to authorize such shares in the Testator's estate *as the parties to the Deed had become entitled unto in interest by the Will, as the Deed treated them to have become*, to be transferred to them in possession, in anticipation of the time specified in the Will, and in specie as now existing.

It is, as it appears to me, an unwarrantable interpretation of the intent of the Legislature, and a strained construction of the language used, to hold that they contemplated by force of a Legislative Act to transfer to B an estate, which in a given event, which may yet happen, the Testator had devised to others, and which he had not at all devised to B, otherwise than contingently upon the happening of an event which has not yet happened, and by possibility may never happen; nor does the Act authorize the Court, contrary to its ordinary course and practice, to administer the Testator's estate upon a summary application, and in the course of such administration to transfer to B the immediate possession and absolute enjoyment of an estate which, under the terms of the Testator's Will, was not vested, and by possibility may never become vested, in interest in him, but which may

become vested in others. The Act, in my judgment, gives no jurisdiction to the Court of Chancery to administer and distribute the Testator's estate to the prejudice of parties who may become the sole parties under the Will, or to deal with such interests in the absence of such persons, and without hearing them or notice given to them; nor do I find anything in the Act which can with propriety be said to divest the Court of Chancery of its high privilege of being the guardian of the rights of infants, or *to compel it* to dispose of those rights to others without suit and a deliberate judgment recorded, and in the absence of the infants. The third section of the Act authorizes any of the parties to the Indenture, or their respective representatives, or the said Trustees, or either of them, or their successors *under the trusts of the said Will* of the said G. J. Goodhue, from time to time to apply in a summary manner to the Court of Chancery, or to a Judge thereof in Chambers, upon notice to such other of the said parties as the said Court or Judge may direct—but for what purpose? The section in question says this summary application may be made only "in respect of any matter or thing for carrying into effect the provisions of the said Indenture *connected* with the management of the trusts of the said Will, *or* in the disposition of the proceeds of the said trust estate, or of any part thereof, or in respect of any matter or thing connected therewith, or in respect of which the said *Court or Judge would have jurisdiction, in case a Bill or other proceeding was instituted in the said Court*, and obtain the order and direction of the said Court or Judge thereupon; and such *order may*, amongst other things, require the said Trustees to submit statements and accounts of the said trust estate and the management thereof, and may generally be to the purport and effect *which, in the discretion of the said Court or Judge*, shall seem meet.

Now, it is an undoubted principle of natural justice, that the rights of parties interested in property, or claiming so to be, shall not be adjudicated upon or disposed of by any Court of Justice in the absence of such parties, or without their

being given an opportunity to assert their rights. To attribute to the Legislature an intent of subverting this universally recognized principle is what I cannot permit myself to do, unless I shall find that intent expressed in such language as is incapable of being mistaken; if the language be doubtful, I must construe the doubtful language so as to maintain and support inviolate a principle so universally recognized, instead of to subvert it. Bearing in view this sacred principle, and seeing no intention expressed in the Act upon the part of the Legislature to subvert it, this third section presents to my mind the clearest evidence that the Legislature were proceeding upon the basis adopted as the frame of the Deed, and the assumption therein apparent, that all parties really interested were parties to the Deed, when it provided that the notice of the proceedings in the Court was to be given only to the parties to the Deed and the Trustees. I cannot interpret the language of this third section as providing that the interests, if any there be, of persons strangers to the Deed shall be adjudicated upon or disposed of by the Court in their absence, or that any such adjudication shall, contrary to the principles of natural justice, be binding upon such strangers so kept in ignorance of all such proceedings. The language of the section seems to me to expressly confine and limit the jurisdiction of the Court and Judge to the jurisdiction which, according to the established and well-known principles of Equity, the Court would have, in case a Bill were filed for the like purpose, and if a Bill were filed, all parties having any interest in the subject-matter in respect of which the jurisdiction of the Court was invoked, should have to be brought before the Court; moreover, it is apparent from the words, "and may generally be to the purport or effect " which *in the discretion* of the Court or Judge shall seem " meet," that everything which the Court or Judge shall do in the premises is left open to the inquiry and the adjudication of a superior tribunal, as to the manner in which, in the given case, such discretion has been exercised; and I must say, that an order made in the absence of Infants claiming to be interested

in a Testator's estate, to which order, when made, is attributed, rightly or wrongly, the effect of depriving the Infants of the right to have the question of their asserted claims enquired into and adjudicated upon by the Court, upon a Bill filed for that purpose, according to the ordinary practice of the Court, can in no sense, in my judgment, be said to be an order made in the exercise of a sound discretion, and can have no effect whatever so as to bind or bar the right of the Infant claimants to have their claims entertained and adjudicated upon in a suit instituted on their behalf.

But this third section presents further evidence to my mind that it was not the intention of the Legislature to subvert the Testator's Will by transferring to his children estates not vested in them in interest by the Will, and which, by possibility, might become the property of his grandchildren, and not of his children, but simply to expedite the enjoyment of estates assumed to be vested in interest; for the trusts of the Will are, by the third section, regarded as still continuing in existence, and, as I read the Act, in all other respects than in so far as the authorizing the transfer of the immediate possession of estates vested in interest, is an interference with these trusts. It is in respect of the management of the trusts of the Will, or the disposition of the proceeds of the trust estate, or in respect of any matter connected therewith, or in regard to which the Court would have jurisdiction in case a Bill were instituted in the Court, that the summary proceeding is authorized. Now, if the Court would not have, and it cannot be contended that *it would have*, irrespective of the Act, jurisdiction on a Bill filed by the children against the Trustees, to compel them to convey to the Testator's children estates not devised to them, then the Statute gives no jurisdiction to do so by the summary proceeding authorized, and an order directing such a transfer to be made is, in my opinion, an order beyond the jurisdiction of the Court to make.

But whatever may be the decision of the Court upon the hearing of the cause instituted by the Infants and the Trustee, Mr. Becher, who in the discharge of the trust reposed in him

by the testator appears to have been in duty bound to invoke by Bill the interference of the Court—whatever may be the proper construction to put upon the Statute, whether or not it shall be found that its operation is absolutely to deprive the testator's grandchildren of the benefit of the testator's bounty, although they, and they only, by reason of all their parents, the testator's children, dying in the life-time of his widow, should prove to be the persons entitled as Devisees of the whole of the testator's residuary estate, the Infant Plaintiffs and their Trustee have, in my judgment, an undoubted right to have the adjudication of the Court by a Decree upon that subject, before the Infants, who are no parties to the Deed to which the statute relates, and who are not mentioned or referred to in the statute, can be said to be barred of rights which, if any they have, exist wholly independently of the Deed, and not by privity with any of the parties thereto.

In so far as the Bill and Demurers thereto are concerned, the case, as it seems to me, may be thus stated. That certain of Testator's grandchildren, who may become entitled under the Trusts of the Will to certain estates thereby devised, and one of the Trustees of the will, who is not acting in concert with Testator's children, file their Bill, in effect alleging that the Testator's children, claiming to be, and alleging that they are, beneficially seized of estates vested in interest (with period of enjoyment postponed) in the Testator's residuary estate, have caused to be prepared a Deed which they have executed, whereby, reciting that *they are* entitled to estates vested in interest in the Testator's residuary estate, with the period of entering into possession and enjoyment only postponed, it is agreed among themselves that they shall enter into immediate possession of such estates vested in interest in them, without waiting for the arrival of the period named in Testator's Will for that purpose, and that they should apply to the Legislature to confirm the Deed, upon the representation that the confirmation of the Deed by the Legislature would be necessary for the reason only of some of the parties to the Deed being *femmes couvertes*, and of the *insufficiency* of the powers conferred

by the Will upon the Trustees, and upon the further representation that all that was desired to be done was to secure the immediate possession of estates already vested in interest in Testator's children, that by such representations they had applied to the Legislature for and upon the faith of the representations procured an Act of the Legislature, which, after reciting the scope, object and purpose of the Deed to be as above, and the alleged infirmity in the Deed which occasioned the sole necessity for applying to the Legislature, enacts and declares that the said Deed, which is set out in the Act, with all its recitals therein contained, shall be valid; that Testator's children thereupon, (still representing their estates under the Will to be vested in interest,) by summary application upon petition, without notice to the Infant Plaintiffs, and without making them parties to the proceeding, applied for and obtained from the Court what the infant Plaintiffs allege and insist was an *ex parte* Order, whereby it is ordered that the Testator's residuary estate shall be divided into six parts, that is, as many parts as there are children of the Testator, and that the trustees of the Will shall immediately transfer and convey one of such parts to each of Testator's children absolutely in severalty; that the infant Plaintiffs and the Trustee, Becher, contend that the Testator's children have not, under the Testator's Will, an estate vested in interest in his residuary estate, or in any part thereof; and that they may never have any such or any estate therein; and that such residuary estate may, under the Will, devolve wholly upon the Infant Plaintiffs and others, Testator's grandchildren; that if the Trustees should obey the order of the Court they would be guilty of a breach of the Trust reposed in them by the Will, and would wholly subvert the Testator's Will; that the Defendants, while admitting that the Testator's children have in reality no estate vested in interest in Testator's residuary estate, insist that the operation and effect of the Act of the Legislature so obtained is to give them such an estate, although before they had none, and to deprive the Infant Plaintiffs of all prospect of enjoying any benefit

from Testator's bounty, and they insist that the order of the Court of Chancery is authorized and required by the Act, whereas the Infant Plaintiffs and the Trustee, Beecher, insist the contrary, and contend that the Legislature had no power to pass an Act having such effect as is contended for by the Defendants; and (although they do not in express terms contend, yet they allege sufficient to raise the point) that the proper construction to put upon the Deed and the Act is, that the Legislature has only authorized to be conveyed to the Testator's six children the estates, if any, which, as they alleged, were vested in interest in them, and that Testator's grandchildren, not being named in the Act, are not affected thereby; and that the Order of the Court of Chancery, being made in their absence, and without their being made parties to the proceeding and without any notice to them, and contrary to the course and practice of the Court, without suit, is wholly inoperative to bar their rights. They pray, therefore, that the Order of the Court of Chancery so obtained may be reversed; that a proper construction may be put upon the Deed executed under such circumstances, and the Act of the Legislature so obtained; and that it may be declared that the Infant Plaintiffs are not thereby deprived of the benefit of the Testator's Will; that the trusts of his Will in their favor shall be adhered to, their rights and interests protected, and the Defendants restrained from proceeding upon the *ex parte* Order so obtained, so as to affect or prejudice any rights, estates and interests devised by the Will to the Infants.

To drive these Plaintiffs from the threshold of the Court by allowing a demurrer for want of Equity, upon the ground that they have no *locus standi* in Equity, because their own Bill shows that the operation of the Deed, Act of the Legislature, and Order of the Court, although they were never named in or made parties to, or had an opportunity of contesting any of such proceedings, and upon which Deed Act of Legislature and Order they ask the Court by Bill to put a construction, has been to deprive them of all interest under the Testator's Will,

seems, I must confess, to me to be a mockery of justice. I am of opinion, therefore, that the demurrers should be wholly disallowed, that the Order made by the Court of Chancery is inoperative as affects any of the rights and interests of the infants, and that what these rights and interests are must be declared in a Decree to be made in the suit, and that in the meantime all proceedings upon the Order in Chancery should be stayed.

As to the appeal of the Trustee, Becher, against the Order itself. His is certainly a very critical position. If the Testator's grandchildren, or any of them, should become entitled, as they may, to demand and receive from him the estate devised to them by their grandfather's Will, he would, according to the ordinary recognized doctrine of the Court, be liable as for a breach of trust if he should not have the estate forthcoming. Now the Statute does not in terms direct him to transfer to Testator's children any estate in which Testator's grandchildren are, or may become, interested; it is only by a strained inference, if at all, that the Act can have that effect. Whether it has or not that effect can only be determined in a suit whereto all parties claiming under the Testator's will are made parties, and by a *Decree* in such suit. Now the Statute does not profess to fetter the Court in the exercise of its discretion; it does not *direct* the Court *peremptorily* to proceed according to a course which would be subversive of the ordinary established doctrine of the Court, that is to say, in the absence of parties interested or claiming to be interested, or to convey or cause to be conveyed to one set of persons estates not devised to them, and which may in terms of the Will devolve upon and become the property of others, some of whom may not yet be in being. The Court is left in the unfettered exercise of its sound discretion as to what, according to the particular circumstances arising, it shall order, and as to how it shall proceed.

It is worthy of notice that the Petition which invokes the interference of the Court proceeds upon the same assertion that the Act of the Legislature proceeded, namely, that the

estates devised to Testator's children by the Will are vested in interest, with the period of enjoyment only postponed. If that be clearly so, then no evil could ensue from the Court proceeding upon a summary petition, on notice to the other parties to the deed; but if strangers to that deed contend that no estate, vested in interest, is at all devised to Testator's children, and that to deal with the estate upon the basis claimed by the children may work a manifest fraud to the Testator's infant grand-children, then, as it seems to me, the proper course for the Court to adopt is to decline to lend its aid to anything prejudicial to such infants in their absence, or otherwise than upon a Bill and by a Decree of the Court, finally determining and adjudicating, according to its ordinary course of proceeding, upon the rights of all parties interested under the Will, and by putting a decretal construction upon the Deed and the Act of the Legislature, which are claimed to have an effect so subversive of all the most acknowledged principles of justice. It was argued upon the authority of *in re* Freeman, 2 Er. and Ap., that no appeal lies from an order made upon a petition, as the order appealed from here was; but that decision does not, in my judgment, govern this case. There the proper proceeding to lead to the order was a petition, and the subject-matter of the petition was not appealable matter. Here what is complained of is, that the taking any proceeding upon the petition without notice to all parties interested, and affecting to bind the interests of absent parties, and to deprive them of their estates, was, as far as these parties are concerned, contrary to natural justice, and that an Order made upon such a petition, which is prejudicial to the Testator's grand-children, was an improper proceeding, and under the circumstances not warranted. *In re* Freeman is, in my judgment, no authority for contending that an appeal does not lie in such a case. I entertain no doubt that it does, and think it was the duty of the Trustee to appeal, and that his appeal should be allowed.

WILSON, J.—at present concurred in the judgment of Mr. Justice Gwynne.

MOWAT, V. C.—I have read the judgment which the Chief Justice has prepared, and, as I concur in it in the main, I have not thought it necessary to write a separate judgment. I may observe, however, that we all agree that, so far as affects property, real and personal, which was actually in the Province at the time of passing the Act, the Legislature had power to pass the Act, even assuming the construction heretofore put upon the Act to be the correct one; and that in holding that the Act was inoperative, so far as relates to property which was out of the Province at that time, I acted on a correct view as to the limits of the power of the Legislature. That restriction receives further support from the late case of Lynch v. the Provisional Government of Paraguay (L.R. Prob. and Div., vol. 2, p. 268), to which we were referred this morning. As to the direction in the order that the Trustees should convey, I do not agree with my learned brother, Galt, that the Court had no power so to order. I think that the Court had that power. I think, however, that conveyances by the Referee would have been effectual, and that it was matter for the discretion of the Court whether to order the conveyances to be executed by the one or by the other; and I do not dissent from the suggestion that that part of the order should be varied. As to the point raised by my brother Gwynne, that the Act does not sufficiently show that the Legislature intended to affect the interests of the grandchildren, I have read his judgment very carefully, but I am unable to say that it has created in my mind any doubt as to the intention of the Act. The object of the Act was plainly to give at once to each of the Testator's six children one-sixth of the Testator's residuary estate; and that is what my Order on the Petition provided that they should have. That may not have been a right thing to do; it may have been a thing entirely unprecedented in British legislation; but the Legislature, as we all think, had power to do it; and I cannot say that, in view of the whole Act, its enactments, its preamble, and the schedule to it, I have the shadow of a doubt that the Legislature had the in-

tention to do what the Orders *in re* Goodhue assumed as their intention.

MORRISON, J.—I entirely agree with so much of the full and able judgment of the learned Chief Justice of this Court, about to be delivered, as applies to the power of the Legislature to pass the Statute in question, and I concur in the remarks of the Chief Justice made in reference thereto; but, with the greatest respect, I cannot acquiesce in the conclusion that the learned Chief Justice has arrived at. I am of opinion, after much consideration of the case, that the Order of the Court below should be reversed, for the reasons stated in the able judgment of my brother Gwynne, whose judgment I had an opportunity of reading and considering. I have only, in addition, to observe that, although we had much argument at the hearing upon the constitutional right of the Legislature to pass the Statute under consideration, little or no notice was taken of what I think is the real matter in question—the rights of the Infant Appellants under the Will of the Testator, and the effect of the Statute upon those rights. It seems to me that to hold that the Infant Appellants are barred and deprived of their rights by virtue of the Statute—which in effect is the result of the Order of the Court below—would be saying that which the Legislature has not said, and that which, in my opinion, the Legislature did not intend, and has not enacted or declared. In order to bar these Infant Appellants of their rights, and defeat the intention and object of the Testator, the Statute, in my opinion, should contain an express and explicit enactment to that effect, specifically referring to the Appellants. I find no such provision or declaration in the Act; and I will further add that I think it is highly improbable that the Legislature had in their minds an intention to defeat the object and effect of the Testator's Will; and it is only reasonable to assume that if the Legislature proposed violently to interfere and deprive the grandchildren of their rights, it would have expressly declared such to be one of the objects and purposes of the Statute.

DRAPER, C. J.—The Hon. G. J. Goodhue, on 11th January, 1870, died, seized and possessed of large real and personal estate, partly in this Province, part in England, and part in the United States. He left surviving him, his wife, one son and five daughters, all married, also the wife of a deceased son, a sister-in-law, as well as several infant grand-children. By his Will, dated 8th December, 1869, he devised and bequeathed to H. C. R. Becher and Verschoyle Cronyn, their heirs, executors, administrators, and assigns, all his estate and property (subject to some specific devises of real estate for the life of the respective devisees, and to certain annuities to his daughter-in-law and sister-in-law), in trust for conversion and collection, and for the investment of the proceeds thereof. He directed the Trustees to pay his funeral and testamentary expenses, his debts, certain legacies, the said annuities, and the taxes and insurance premiums on a house and premises devised to his wife. He directed the surplus of the annual income and proceeds of his estate to be accumulated during the life of his widow, and that upon her death the Trustees should hold all the trust premises then undisposed of and not otherwise disposed of by his Will, in trust to make good any loss that might have arisen and been ascertained in the investment and control of certain moneys which he had paid over to the said Becher and Cronyn in trust for his (the Testator's) children respectively, and which sums and the trusts thereof were more particularly described in six certain Indentures of Settlement dated the 8th December, 1869, and respectively executed by the Testator and the said Becher and Cronyn, and thereafter in trust for all the Testator's children who should be living at the decease of his wife, in equal shares, and for the child and children of such of them as might then be dead, in equal shares, such grand-child or grand-children to be entitled to the share which his, her, or their father or mother would have been entitled to if living.

By Indenture made after the Testator's death, and dated 26th September, 1870, his widow, his surviving son, and his five daughters and their respective husbands, after reciting

the Will, and after other recitals as to the annuities and legacies, and that the residuary estate amounts to more than $300,000, and that it was desirable that the children should respectively enter into possession and enjoyment without waiting for the death of the Testator's widow, and that the several parties had agreed to execute the said Indenture, in order to secure to each of the children of the Testator the immediate possession of their respective shares in the residuary estate, exclusive of their reversionary interest under the Will, they mutually covenanted and agreed that sufficient sums to pay the annuities and other charges created by the Will should be set apart and held by the Trustees to pay and satisfy the annuities and other charges mentioned in the Will, after which they provide for the division of the residue of the trust estate into six parts, and for the allotment of one part to each of the children absolutely in severalty, the share allotted to each daughter being free from the control of her present or any future husband. Similar provision is made for the division of the reserved sums as they severally fall in, and they also agree to apply to the Legislature of Ontario to confirm the arrangement, and for all necessary and incidental powers.

By the Statute of Ontario, 34 Vict. c. 99, passed 15th February, 1871, it was, after reciting the Will at length, and referring to the deed of 26th September, 1870, enacted that the said deed should be confirmed and made valid, and the Trustees were authorized and required to carry into effect the provisions thereof; and were, in so doing, saved harmless and indemnified.

Mr. Becher, one of the Trustees named in the Will, has refused to carry out the arrangements contemplated by this deed, and confirmed by the Statute. The other Trustee has expressed his readiness.

Thereupon a petition was presented to the Court of Chancery, by the Testator's six children, praying that the Trustees might submit their accounts, that a Referee might be appointed for making the allotment and distribution provided

for by the Indenture, that the Trustees might be ordered to carry into effect such allotment and distribution, when made, and that all proper directions might be given, enquiries had, and accounts taken.

The Court made an order, granting the prayer of the petition, against which Mr. Becher appeals. 1. Because it was beyond the power of the Legislature to pass this Statute, and it ought not to have been acted upon by the Court. 2. Because it appeared that some of the parties, prejudicially affected by the Statute, were domiciled in Great Britain, and others in the United States of America, and never had their domicile in this Province. 3. Because a considerable portion of the Testator's estate was not in this Province at the time of his death. 4. Because the order directs the Appellant to commit a breach of trust, without affording him any protection.

A suit was also instituted in the Court of Chancery in the names of three infant grandchildren of the Testator, not living in the Province, and by Mr. Becher, against all the children of the Testator, and against the several husbands of his daughters, and some of the Testator's grandchildren. The bill, among other things, set forth, that by the Royal Instructions, the Governor-General was directed to reserve for the Royal Assent, or to disallow, any bill of an extraordinary nature and importance, whereby the rights and property of Her Majesty's subjects, not residing in the Dominion of Canada, might be prejudiced. That the petition above stated had not been served on the Infant Plaintiffs, or Infant Defendants in this suit, nor was any notice given them. And it prays for an injunction against any act or thing, by virtue of the Order of this Court, on the aforesaid petition, or the Statute, or the Indenture or Deed of Distribution, and that the Indenture of Distribution, Statute, and Order may be declared void, and that the trusts of the Will may be carried into effect.

The Testator's son, Charles F. Goodhue, demurs to so much of this bill as seeks relief in respect of the Orders of

the Court, as no case is made for relief by the bill, and as the matters thereinbefore specified were adjudicated on the hearing of the petition.

Some of the other Defendants also demur to the amended bill, on the ground that it makes no case for relief.

The Court allowed the first Demurrer, giving leave to amend, and disallowed the second.

The Plaintiffs appeal against the Order allowing the Demurrer, and the other demurring Defendants appeal against the disallowance of their demurrer.

The principal question arises on the first reason of appeal against the order made upon the petition, viz., that it was beyond the power of the Legislature to pass this Statute. If the Act can be shown to be a dead letter, the order founded upon its validity falls lifeless and inoperative. It required an Act of the Legislature to alter a Will after the death of a Testator, which Will was at the time of its execution made in strict accordance with the law of the land, and in exercise of his rights and power; for it is not questioned that he had sufficient discretion to make a Will, and that he exercised his own free will. He was under no legal incapacity, and it stands admitted that before this Act was passed the Will was operative, the estates and interests created and given, vested in the trustees and in the beneficiaries named; and the very Deed by which the children of the Testator agree to defeat, as far as in them lies, the accumulation directed by the Testator, as well as certain contingent interests given by him to his grandchildren, provides that it, the Deed, shall be of none effect unless the Act desired is obtained from the Legislature. The life estate of the Widow in the mansion and premises in which the Testator resided rests on the Will alone; for though the Act confirms the Indenture of 26th September, 1870, it confirms nothing else, and the Indenture does not profess to deal with the devise to her. And further, I cannot refrain from remarking that to every owner of lands or goods in the Province of Quebec, who has a right to alienate the same in his lifetime—is given by the

Statute of 14 Geo. III., chapter 83, s. 10, the right to devise or bequeath the same at his or her death ; and that such right was virtually, though not in words, re-enacted and confirmed by the first statute of Upper Canada, which made the law of England the rule for the decision of all matters of controversy relative to property and civil rights. This right the Testator had, and he exercised it in a legal manner.

The conduct of the children, beneficiaries under this Will, is not marked with that deference and respect for the wishes and intentions of their deceased father which he most probably anticipated and relied upon, and but for which reliance he might have made the disposition of his property in such form as to ensure effect being given to what he might express.

He was absolute owner of a large amount of property. By law he and he only could transfer it, either by his acts while he lived or by his Will to take effect after his death, by which latter means he might either fulfil, or disappoint, or qualify the *spem successionis* which blood relationship or kindred might create.

Now, whether by his Will or by intestacy (leaving the disposition, regulated by law, to take effect), on his death the rights which up to his death the owner of private property had, are transferred, and any one who prejudices such rights or interferes with their enjoyment is a wrong-doer to the transferee, as by similar acts he would have been to the prior owner in his lifetime.

These are mere truisms, but they have their application to the present case.

The Testator intended that his residuary estate should accumulate during the life of his widow. He intended, also, that the children of any of his children who died in the lifetime of his widow should take their parents' share, and he provided for both these matters in language as clear as that used by him in making gifts to his children. But his intention evidently has met neither their wishes nor their expectations, and, therefore, the deed of 26th September, in which

there are no other considerations suggested than these—because the residuary estate exceeds $300,000, because "it is desirable" that the children should get their shares immediately rather than that they should wait for the period fixed by the Testator, and because they executed that deed to secure to each child such immediate possession by an immediate division of this large residue, they mutually agree on a mode of division which shall bind them; and because it was "doubtful" whether their arrangements could be legally assented to and carried out by the Trustees by reason of the coverture of several of the parties, and also from the insufficiency of the powers of the Trustees under the Will, they agree to apply to the Legislature to confirm *their* arrangements, and to compel the Trustees to carry them out in place of those stated in the Will; in other words, to abrogate the disposing power of the Testator after he had unequivocally exercised it, and to take away the possibility which the Will had created in favor of grandchildren—in short, to deprive him of powers which the law had given him.

The concurrence of the widow is really of no importance; for, in fact, the deed does not prejudice any of her interests arising under the Will; on the contrary, it seems designed to secure them to the fullest extent.

I think that, on the death of the Testator, the rights of his children under his Will became vested in interest, though not in possession; but that they were liable to be defeated as to each child if he or she should die in the lifetime of the Testator's widow, in which case the interest of such child vested in his or her children, but was still postponed as to possession till the death of the widow. The promoters of the Act sought to have their interest given to them in possession.

The Legislature have passed such an Act as the parties applying desired. They have, in effect, altered the Testator's Will—not to supply a defect, which rendered it difficult or impossible for his Trustees to carry his intentions into effect—but to substitute an intention contrary to what he has expressed, by rendering the accumulation impossible, and ma-

king the division immediate which he directed should await the death of his widow.

It would be indecorous to express what it would be fitting for a Court to express if such changes had been procured in the Testator's lifetime, by or through any fraud or imposition upon him. It is now, if a valid Act, the Act of the highest authority—an Act of our Legislature, which has received the assent of the head of the Local Executive on behalf of the Governor-General. It cannot, however, be disrespectful to quote the language of Lord Tenterden. "It is said the last will of a party is to be favorably construed, because the testator is *inops consilii.* That we cannot say of the Legislature; but we may say that it is '*magnas inter opes inops.*'" (Surtees v. Ellison, 9 B. & C., 752.)

No English authority has been cited, nor do I think there is any, which would warrant our denying the power to pass such an Act. There may be cases in which the decisions look in the direction of neutralizing the enactment by construction, or in which a long series of decisions have, as it were, fined away the force of the language used, so as apparently to disappoint the intention of its framers; but they do not apply here.

Among the classes of subjects with regard to which exclusive power is given to the Provincial Legislatures to make laws, we find "property and civil rights in the Province," and "generally all matters of a merely local or private nature in the Provinces." I cannot say that the present is not a matter belonging to one or other of these classes.

Nor do I think that we can derive any help from American authorities, though there is much to be found full of valuable suggestion to those who wield the Legislative power. For, as in England, it is a settled principle that the Legislature is the supreme power, so in this Province, I apprehend that within the limits marked out by the authority which gave us our present Constitution, the Legislature is the supreme power. It is on this principle that private Acts of Parliament are upheld as common modes of assurance, being founded

upon the actual or implied assent of those whose interests are affected.

But this power of binding private rights by Acts of Parliament is, as Sir W. Blackstone suggests, to be used with due caution and upon special necessity: as to cure defects arising from the ingenuity or the blindness of conveyancers, or from the strictness of family settlements, or in settling an estate, as where the tenant of the estate is abridged of some reasonable power; or to secure the estate against the claims of infants, or other persons under legal disabilities. In these or the like cases "the transcendent power of Parliament is called in to cut the Gordian knot." (Parl. His., Vol. IV., p. 247). The restoration of Charles II. gave rise to a good deal of this private legislation, and at the close of the Session (13 Ch. II., 1661) His Majesty observed on the unusual number of Private Bills, "But I pray you let this be done very rarely hereafter. The good old rules of the law are the best security. And let not men have too much cause to fear that the settlements that they make of their estates shall be too easily unsettled *when they are dead*, by the power of Parliaments."

It may not be too much to suggest that, in the absence of a second Chamber, and to secure the interposition of full discussion and patient consideration between the introduction of private bills and the final act of legislation, there should be some stringent rules as to full particulars of notice, and providing for a long interval between the first reading and the third; and again for ample time for a report by the Law Officers of the Crown, as to the protection of any private interests involved. These, however, are not questions for our consideration.

"As to what has been said as to a Law not binding if it be contrary to reason, that can receive no countenance from any Court of Justice whatever. A Court of Justice cannot set itself above the Legislature. It must suppose that what the Legislature has enacted is reasonable, and all, therefore, that we can do, is to try to find out what the Legislature intended. If a literal translation or construction of the words

would lead to an injustice or absurdity, another construction possibly might be put on them, but still it is a question of construction, and there is no power of dispensation from the words used."—[Per Lord Campbell in Logan *vs.* Burslem, 4 Moo. P. C. C., p. 296.]

Mr. Sedgwick, in his learned and admirable treatise upon Statutory and Constitutional Law, argues, and I think unanswerably, that the Judiciary have no right whatever to set aside, to arrest or nullify a law passed in relation to a subject within the scope of Legislative authority, on the ground that it conflicts with their notions of natural right, abstract justice, or sound morality."—(P. 187).

Again, Chancellor Kent (1 Com. 408) writes, "Where it is said that a Statute is contrary to natural Equity or reason or repugnant, or impossible to be performed, the cases are understood to mean that the Court is to give them a reasonable construction. They will not, out of respect and duty to the Lawgiver, presume that every unjust or absurd consequence was within the contemplation of the law; but if it should happen to be too palpable to meet with but one construction, there is no doubt in the English Law of the binding efficacy of the Statute."

A late British writer has remarked, it may be argued, that a second Chamber is considered a valuable element in the Constitution, (in the mother country), and that as to its importance he makes no dispute. "On the principle of a division of labour it is wanted for the despatch of business, and it is also required for the interposition of discussion and delay between the hasty introduction of bills and the final act of legislation."

In regard to the absence of a second chamber, it may be further observed, so far at least as estate or private bills are concerned, that as such bills involve ordinarily no mere party political considerations, all those whose interests are or may be touched have a right, in the first place, to expect a careful examination of their contents on the part of the Provincial Executive—and a withholding of the Royal assent if it is found

that the promoters of the bill are seeking advantages at the expense of others whose interests are as well grounded as their own. And, further, if from oversight or any other cause, provisions should be inserted of an objectionable character, such as the deprivation of innocent parties of actual or even possible interests, by retroactive legislation, such bills are still subject to the consideration of the Governor-General, who, as the representative of the Sovereign, is entrusted with authority,—to which a corresponding duty attaches, to disallow any law contrary to reason or to natural justice and equity. So that while our legislation must unavoidably originate in the single chamber, and can only be openly discussed there, and once adopted there cannot be revised or amended by any other authority, it does not become law until the Lieut.-Governor announces his assent, after which it is subject to disallowance by the Governor-General.

I can find neither principle nor authority upon which to hold that the Courts of this Province have jurisdiction to override or pronounce nugatory, Acts passed by the Legislature in relation to matters coming within the classes of subjects enumerated in the 92nd Section of the B.N.A. Act. We have not failed to consider the exception in the 129th Sec. in connection with 14 Geo. III., c. 83, s. 10; but we think that we could not hold that these provisions place beyond the power of the provincial Legislature an Act like that in question.

I have not omitted to consider the difference of the language used in, as well as the substance of, the clauses of the British North America Act, 1867—on erecting the Parliament of the Dominion, and the Legislatures of the respective Provinces.

In and for the Dominion, there is one Parliament, consisting of the Queen, the Senate, and the House of Commons, and the Sovereign being one branch of this Parliament, provision is made for the Royal assent being given by the Governor-General in the name of the Sovereign, whose commission, under the Great Seal of the United Kingdom, he holds, to such Bills as the two Houses pass, or for the reservation of any such

Bills for the signification of Her Majesty's pleasure. An Act assented to by the Governor-General may, however, be disallowed by the Queen in Council, within two years after it has been received by one of the Principal Secretaries of State, to whom it is the duty of the Governor-General to transmit it.

But, in the Province of Ontario, there is constituted a *Legislature*, not as in the Dominion, a Parliament, which Legislature consists of the Lieut.-Governor—and of one House, styled the Legislative Assembly of Ontario.

As to assenting to Bills passed by the Legislative Assembly, it is provided for only under sec. 90 of the British North America Act, 1867, which extends the provisions of that Act, regulating (among other things) the Assent to Bills, the disallowance of Acts and the signification of pleasure on Bills reserved, to the Provincial Legislatures with some alterations and substitutions. The assent to bills is regulated by sec. 55 of that Act, thus: "where a bill passed by the Houses of Parliament is presented to the Governor-General for the Queen's assent, he shall declare according to his discretion," &c., &c. Reading this, together with sec. 90, a doubt may possibly be suggested, whether in relation to the Provincial Legislatures, it should be read—"where a Bill passed by any of the Provincial Legislatures is presented to the Lieut.-Governor for the Governor-General's assent—he shall" &c. This would apparently be the literal substitution provided for by sec. 90, and if correct, this consequence would follow: the "Governor-General" being substituted for "the Queen," the Lieutenant-Governor would declare "that he assents to the Bill in the Governor-General's name, or that he withholds the Governor-General's assent, or that he reserves the Bill for the signification of the Governor-General's pleasure." I am not called upon to put a construction on these two clauses, nor shall I offer any opinion with regard to the proper construction as to the assent to Bills.

As to disallowance, the clauses as to the Lieutenant-Governor's duty seem clear, that he is required by the first convenient opportunity to transmit an authentic copy of each

Act assented to by him to the Governor-General, and if the Governor-General in Council within one year after the receipt thereof by him thinks fit to disallow the Act—such disallowance (with a certificate of the Governor-General of the day on which the Act was received by him) being signified by the Lieutenant-Governor by speech or message to the House of Assembly or by proclamation, shall annul the Act from and after the day of such signification.

But whether the power of assent or disallowance be, under the British North America Act, as regards Acts of the Legislature of Ontario, absolutely vested in the Governor-General so that he exercises such authority as given to him by that Act—and as in regard to the Parliament of Canada acting in the name and behalf of the Queen herself as the Lords Commissioners do in the mother country when Her Majesty cannot attend in person—makes, as far as I can see, no difference in the authority of the statutes when finally assented to. The Statutes of the Legislature of Ontario are binding on all the residents of that Province, if made in relation to the subjects enumerated in the 92nd sec. of the British North America Act, 1867.

Assuming this Act to be in force, there is a difference of opinion between us as to its effect. As I understand, some of my brothers place a much more limited construction upon it than I can agree in.

Their view is, as I understand, chiefly founded upon the eighth clause of the deed of 26th September, 1870, as set out in the schedule to the statute in question, which recites doubts whether the intended arrangement for the settlement and distribution of the estate could be carried into effect by the trustees *by reason of the coverture of several of the parties thereto* and from the insufficiency of the powers of the Trustees under the will, and it is contended that the first section of the statute by which that deed "is confirmed and declared to be valid," and the Trustees are authorized to carry into effect the several provisions thereof, has no greater effect than to remove the objection as to coverture, and to enlarge the

powers of the Trustees so as to carry into effect such matters as were doubtful for the cause suggested.

It will not be disputed, that this being a private Act, ought to receive a strict construction so far as the interests of all parties affected by it are concerned. The intention fo the Legislature, to be collected from the general object and from the language of the first section, which alone is in question, must decide our judgment; and the recitals of the Act may, and I think must be taken into consideration to aid in arriving at that intention.

Now the first thing recited in the Statute is the petition praying for relief, which sets forth the Testator's will containing the provision already set out, by which he provided for the conversion and collection of his estate, and after other provisions, devised and gave the same in trust for all his children who should be living at the decease of his wife, in equal shares, and the child or children of such as might then be dead, in equal shares, such grandchild or grandchildren to be entitled to the share his or her or their father or mother would have been entitled to if living. The petition further sets forth that the shares of the said children are considerable, and that it is desirable they should enter into possession and enjoyment of the same, and that this should not be postponed until the decease of the widow; that to secure to the children such immediate possession and enjoyment of their respective shares, the petitioners respectively executed a certain instrument dated 26th September, 1870—a copy of which is set forth in a schedule annexed to the Act—and they prayed that an Act might be passed *to confirm the Indenture and the several provisions thereof, and to effectuate the same.*

The next recital is in these words, "*And whereas it is expedient to grant the prayer of the Petitioners,*" and immediately following, the first clause, confirming "the said Indenture," declaring it valid, and authorizing and requiring the Trustees to carry into effect the several provisions thereof.

Now what was the prayer of the Petitioners?

The Will, in very clear language, postpones the possession and enjoyment by the Petitioners of this residuary estate until the death of the Testator's widow. The Petition states that it is desirable that the Petitioners should enter into possession and enjoyment, and that this should not be postponed, and prays the confirmation of the deed of 26th September, and the provisions thereof, and to effectuate it.

The deed, so far as the Petitioners are seeking the aid of the Legislature for their individual benefit, provides for the division of the above-mentioned residue of the trust estate (exceeding, as is stated, $300,000), by allotting the same into six separate shares, and as soon as these allotments are made, for their distribution in a mode provided for, and for the conveyance of a share to each party according to the distribution and allotments, and this deed the Act confirms and declares to be valid.

According to my view of the intention of the Legislature, derived from the recitals to the Act, and this short but comprehensive clause, they intended and have enacted, that the division among the Testator's children should not be postponed as the will directs, but should be immediate, although on the face of the Will a contingency is foreseen and provided for, which the Act, as I understand, advisedly defeats.

I have already stated the opinion, as I understand, held adverse to the construction I place on the Act.

I must observe that the recital relied upon for this opinion is not a recital in the Statute, but in a deed of the Petitioners, that the language of it is not the language of the Legislature, nor is it incorporated by the Legislature into their Act; it is set out in a schedule as the thing confirmed and made valid by the Act, but not as a part of it. I have looked with some care into authorities without meeting one which would lead me to treat the recital in this deed as a part of the Act. I do not know whether it is contended that this deed is to be construed, owing to the recital, as only meant to do away with the disability of coverture, and to enable the Trustees to act as if such disability did not exist, but I have not so under-

stood the opinions of those from whom I have the misfortune to differ.

I must further add, that no such point, either as to the deed or the Act, is raised by the reasons of appeal, nor was it, to my recollection (though I would not rely on that after the lapse of six or seven months), alluded to during the argument.

It has been suggested that the order on the petition was *ex parte;* but that is not so, as the Trustees were respondents, and Mr. Becher appeared by his counsel, and opposed the petition, in the interest of the grandchildren. The point, that all the grandchildren, though minors, should have been served with the petition and made parties to it, is not taken in the reasons of appeal, nor was it urged before us in argument. All who might be interested could not have been served ; as future born grandchildren would take equally with those *in esse* now : and to serve the infants now living with their parents, in order to give them an opportunity of opposing the petition of their parents, would obviously have been useless for any practical purpose. By the practice of the Court of Chancery, as regulated by the 61st Consolidated Order, and as decided in King *v.* Keating (12 Grant 29) and other cases, Trustees sufficiently represent their *cestuis que trust*, though the Court of Chancery, if it thinks fit, may order any of the *cestuis que trust* to be made parties also ; and it is plain, in the present case, that the Legislature did not mean that all should be served, for the Act, in express terms, left it to the Court to direct to whom notice of the petition should be given.

We are, however, of opinion that the Act does not affect real or personal property not being within this Province. A majority of the Court are of opinion that this order is appealable. This being so, I am of opinion that it should be varied —by striking out the fifth section and inserting in lieu thereof, "that after such allotment and distribution, the said Master do convey and transfer the respective shares of each of the said petitioners, according to the respective natures of

the several parts of such share, unto and to the use of each of the said petitioners, their respective heirs, executors, administrators and assigns, absolutely in severalty, the shares of each of the said petitioners, being daughters of the said Testator, being so conveyed and transferred for their respective separate use, free from the control of any present or future taken husband."

I am further of opinion that Mr. Becher was doing no more than his strict duty in opposing this petition, and also in bringing before the Court by means of both appeals the very important question involved in this case, and the suits of Tovey *et al.* vs. Goodhue and others, and that he should have all his costs, charges and expenses in relation to the proceedings in both cases and the two appeals, to be deducted from that portion of the residuary estate which is to be distributed under the said order.

BARKER — for the Plaintiff, asked the Court if the proceeds of some £10,000, Consols, brought to this country after Mr. Goodhue's death, were to be included in the division.

DRAPER, C. J, and MOWAT, V. C.—Yes, if the money was in Ontario at the time of the passing of the Act.

BECHER, Q.C. — prayed, that as there was in effect no judgment of the Court of Appeal, the Court being equally divided, and as it was most desirable that a judgment should be obtained, which either party could appeal from to the Privy Council, the case might be re-argued at an early day. There might be then a fuller Bench.

The Court granted the application ; and intimated that it would sit for the purpose of hearing the cases re-argued, on Monday, the 11th March, at 10 a.m.